

**Worker's Compensation
Insurance Letter**

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Program	Administrative Code
Type	Interpretation change
Replaces	None



**State of Wisconsin
Department of Workforce Development**

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To: Claims Handling Offices
From: Judy Norman Nunnery, Division Administrator
Subject: DWD 80.32(11) - cervical back surgery - minimum permanent disability rating

Purpose: The purpose of this letter is to advise insurers that, for injuries on or after July 1, 1994, the Department will follow the interpretation of the Labor and Industry Review Commission (LIRC) regarding the effect of the 1994 amendments to Wis. Admin. Code s. DWD 80.32(11). Specifically, the minimum permanent disability rating in DWD 80.32(11) for a cervical fusion involving the removal of disc material is 10% per level, not 5% per level.

Background: DWD 80.32 establishes the minimum permanent disability percentages for amputations, loss of motion, sensory losses and surgical procedures. Periodically, the Department surveys physicians to determine if the minimums in DWD 80.32 need adjustment based on current medical practice and surgical outcomes. After the last physicians' survey, the Department, with the unanimous approval of the Council on Worker's Compensation, enacted several changes to DWD 80.32 that took effect July 1, 1994. Some minimums were increased; others were reduced; most were unchanged. DWD 80.32(11) was amended to read as follows:

"Removal of disc material, no undue symptomatic complaints or any objective findings	5%
Chymopapain injection	To be rated by doctor
Spinal fusion, good results	5% minimum per level
Removal of disc material and fusion	10% per level
Cervical fusion, successful	5%
Compression fractures of vertebrae of such degree to cause permanent disability may be rated 5% and graded upward	

Note: It is the subcommittee's intention that a separate minimum 5% allowance be given for every surgical procedure (open or closed, radical or partial) that is done to relieve from the effects of a disc lesion or spinal cord pressure. Each disc treated or surgical procedure performed will qualify for a 5% rating. Due to the fact a fusion involves 2 procedures a 1) laminectomy (discectomy) and a 2) fusion procedure, 10% permanent total disability will apply when the 2 surgical procedures are done at the same time or separately."

The earlier rule provided 10% minimums for good results, but only at specified lumbar levels L5-S1 and L4-S1. In the 1994 amendments, the Department omitted L5-S1 and L4-S1 references, and added a note and examples, to respond to some insurers' questions about whether the minimums applied to some newer surgical techniques. The Department did not intend to change the minimum for cervical fusions. The earlier rule and the current rule both specified the same 5% minimum for a successful cervical fusion. However, in *Terry Manka v. Bill Wittman Builders*, LIRC awarded the applicant an additional permanent partial disability of 5% for a cervical fusion and discectomy. LIRC stated:

"The commission has modified the administrative law judge's order to award an additional 5 percent disability as required under the administrative code.... DWD 80.32...make(s) it clear that five percent is the minimum rating for a fusion or removal of disc material. Further, when both occur at one time the minimum rating is 10 percent."

LIRC decisions do not create legal precedents that the Department is required to follow in future cases on the same subject. Until recently, the Department declined to apply LIRC's interpretation in *Terry Manka v. Bill Wittman Builders*. However, LIRC continues to award the additional 5% in similar cases on appeal.

Earlier this year, the Department asked the Council on Worker's Compensation to consider a rule change to clarify its intent. The Council understood that if it did not recommend a change in the rule, the Department would probably change its interpretation of the rule. After considerable discussion of the appropriate precedents, the Council did not recommend a rule change at this time.

Therefore, the Department will apply LIRC's interpretation in preparing disability worksheets and in conducting hearings. For the Department to do otherwise would only encourage injured workers who have undergone a cervical fusion and discectomy to hire an attorney (to whom they would pay a 20% fee) to file an application for hearing and appeal a decision awarding less than 10% to LIRC.

Action Requested: For injuries on or after July 1, 1994, the Department's position is that insurers should pay a minimum of 10% permanent disability for a cervical fusion involving the removal of disc material.

Inquiries: If you have further questions, please contact Richard D. Smith, Director, Bureau of Legal Services, at (608) 267-6704 or smithri@dwd.state.wi.us.

References: Wis. Admin. Code s. DWD 80.32(11)

Terry Manka v. Bill Whitman Builders, WC Claim No. 940522401 (LIRC Nov. 25, 1997) See on internet site: www.dwd.state.wi.us/lirc/wcdecns/192.htm